IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.883 OF 2007

1.Ranjanabai Kashinath Shinde
2.Vilas Kashinath Shinde
3.Arvind Kashinath Shinde
4.Shantaram Mahadu Shinde
5.Bhaskar Mahadeu Shinde
6.Govind Mahadeu Shinde
7.Ramesh Ganpat Shinde
8.Vishnu Ganpat Shinde ...Petitioners

vs.

1.Govind Laxman Rajendra
2.Gopal Laxman Rajendra
3.Shashikant Laxman Rajendra
4.Dr.Jayant Laxman Rajendra
5.Ganesh Yashwant Rajendra
6.Smt.Kusum Yashwant Rajendra
7.Rajshra Sadanand Sahane ...Respondents

Mr.V.Z.Kankaria i/b Mr.Rahul D.Motkari for the Petitioners
Mr.Girish R. Agarwal for Respondent Nos. 1 to 5.

CORAM: A.S.OKA,J.
DATE OF HEARING LAST ARGUMENTS: 4TH MAY 2007
DATE OF PRONOUNCEMENT OF JUDGMENT:4TH JUNE 2007

JUDGMENT:

1. By this Petition under Article 227 of Constitution of India, the Petitioners who are first to eighth Defendants have challenged the Judgment and Order dated 10th January 2007 passed by the learned IV Joint Civil Judge, Junior Division and Judicial Magistrate First Class at Nasik below Application at Exh.17 in a suit filed by the first to fifth Respondents herein.

2. The suit filed by the first to fifth Respondents relates to agricultural lands described in paragraph 1 of the plaint.

The prayer in the suit is for perpetual injunction restraining the Petitioners and other Defendants from interfering with the alleged possession of the first to fifth Respondent over the suit land.

3. The suit was contested by the Petitioners and sixth and seventh Respondents by filing a written statement. In the said written statement, it is contended by the Petitioners that the suit land was in possession of the predecessor of the Petitioners and other Defendants as an agricultural tenant thereof. It is contended that right from 1955-1956 to 2001-2002 in the 7/12 extracts, the names of the Petitioners and other Defendants were appearing. It is contended that on 1st April 1957 the suit lands were not in possession of the first to fifth Respondents or their predecessor. It is contended that the Petitioners and sixth and seventh Respondents are the legal representatives of one Amruta Shinde who was an agricultural tenant in respect of the suit land along with one Khandu Shinde.

4. The Petitioners and the sixth and seventh Respondents made an Application at Exh.17 praying that a reference be made to the Agricultural Lands Tribunal for deciding the issue of tenancy. While making the said application, the Petitioners and the sixth and seventh Respondents invoked the provisions of section 85-A of the Bombay Tenancy and Agricultural Lands

Act, 1948 (hereinafter referred to as the said Act of 1948). The said Application was contested by the first to fifth Respondents by filing a reply. By the impugned Judgment and Order dated 10th January 2007, the learned Trial Judge rejected the said Application by holding that the names of the Petitioners and sixth and seventh Respondents have been removed from the revenue record and the first to fifth respondents were in possession as per the revenue record. The learned Judge observed that the suit was simplicitor for injunction and therefore, it was not necessary to make a reference for deciding the issue of tenancy.

5. The learned Counsel for the Petitioners submitted that even in the impugned order a submission of the Advocate appearing for first to fifth Respondents has been recorded that the original Defendants voluntarily surrendered their tenancy rights. He submitted that it is well settled position of law that even in a suit simplicitor for injunction if the issue of tenancy arises, section 85-A of the said Act of 1948 will apply and a reference will have to be made to the Tribunal for deciding the issue of tenancy.

6. The learned Counsel for the first to fifth Respondents supported the impugned order by pointing out that merely because the issue of tenancy was raised, it is not mandatory for the Court to make a reference. He submitted that making a

reference in this case will be abuse of process of law as the issue of tenancy does not arise in this case. He submitted that without examining the merits of the case, reference cannot be made mechanically. He submitted that the court has to examine the substance of the claim and if the claim of tenancy is frivolous, the court has every justification for rejecting the prayer for reference. He placed reliance on the various decisions of this Court and Apex Court.

7. I have considered the submissions made by the learned Counsel for the parties. A reliance has been placed on the decision of the learned Single Judge of this Court in case of Pandu Dhondi Vs. Ananda Krishna (1974 Mh.L.J. page 548). By the said decision, the learned Single Judge held that when a vague plea is made by the Defendant contending that he is a tenant, the court should hesitate to frame the said issue on the basis of such vague plea unless the defendant is able to give some particulars of the plea of tenancy. In another decision of this court in case of Pulmati Shyamlal Mishra and another vs. Ramkrishna Gangaprasad Bajpai and others (1981 Mh.L.J. page 321), the Division Bench of this Court had an occasion to consider the question. The Division Bench held that the Court is under no obligation to frame and remit an issue of tenancy mechanically merely on the same being raised in the written statement, without judicial satisfaction of its necessity and justification. The Division Bench held that the

issue of tenancy cannot be framed on the basis of a frivolous or fraudulent plea of tenancy which is part of dilatory strategy. The Division Bench proceeded to observe in paragraph 36 of the said decision as under:

"36. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and malafide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind...."

8. Turning back to the impugned order, it appears that the learned Judge has recorded a submission of the learned Advocate appearing for first to fifth Respondents that the original Defendants have voluntarily surrendered the tenancy. The learned Judge has relied upon the entries in the revenue record as obtaining on the date of institution of the suit and has observed that the original plaintiffs were in possession as per the entries in the revenue record. The learned Judge was also influenced by the fact that the suit was simplicitor for perpetual injunction. In so far as this aspect is concerned, in case of Bhagwanrao s/o Jijaba Auti vs. Ganpatrao s/o Mugaji Raut and another (1987 (3) Bom. C.R.

page 258) the Division Bench of this court has decided the following issue :

. "In a suit simplicitor for a permanent injunction, is it necessary to frame an issue of tenancy either of the plaintiff or of the defendant ?"

The Division Bench answered the issued by holding that in a suit simplicitor for permanent injunction, it is necessary to frame the issue of tenancy either in favour of the Plaintiff or in favour of the Defendant, as the case may be. It is, thus, apparent that the application for reference made by the Petitioner could not have been rejected only on the ground that the suit was simplicitor for perpetual injunction.

10. The only other ground on which Application is rejected is that the entries in the revenue record on the date of institution of the suit show that the first to fifth Respondents were in possession. It is true that the court was required to examine the plea of tenancy to ascertain whether the same was demonstrably frivolous or malafide. However, only on the basis of the entries in the revenue record on the date of institution of the suit, the Trial Court could not have held that the plea was demonstrably frivolous or malafide. In fact, a finding is not at all recorded by the Trial Court that the plea of tenancy was frivolous or

malafide. The fact that the name of the defendant did not appear in the revenue record on the date of institution of the suit has a limited significance considering the nature of the plea raised by the Petitioners and sixth and seventh Respondents.

11. As consistently held by this Court, merely because the plea of tenancy was raised, the Court could not have mechanically framed the issue of tenancy and referred the same to the Tribunal. The Court was prima facie required to examine the plea to ascertain whether it was either demonstrably frivolous or malafide. However, the said aspect has not been considered by the trial Court. The said aspect will have to be considered by the trial Court after giving an opportunity of being heard to the parties. Therefore, impugned order will have to be set aside with a direction to the trial Court to decide the same afresh.

12. Hence, I pass the following order :

i) Impugned Judgment and Order dated 10th January 2007 is quashed and set aside and the Application at Exh.17 made by the Petitioners and sixth and seventh Respondents is restored to file.

ii) The learned Trial Judge will decide the said

Application afresh in the light of the observations made in this Judgment after hearing the parties.

iii) Writ Petition is partly allowed in above terms with no order as to costs.

JUDGE